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CIMB BANK BHD v. PEMUNGUT DUTI SETEM

COURT OF APPEAL, PUTRAJAYA
CHE MOHD RUZIMA GHAZALI JCA
AZIMAH OMAR JCA
AZIZUL AZMI ADNAN JCA
B [CIVIL APPEAL NO: W-01(A)-719-09-2022]
29 JULY 2024

Abstract – *Section 4(3) of the Stamp Act 1949 generally provides that only the principal instrument documenting a transaction is chargeable with duty. It does not, however, apply when: (a) the instrument does not fall within the categories of 'sale, lease, charge, settlement, exchange of partition' as specified in the said section; and (b) the instrument itself creates new payment obligations, even if it is related to pre-existing obligations.*

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REVENUE LAW: *Stamp duty – Ad valorem duty – Bank's client defaulted on payment obligation under confirmation governed under International Swaps and Derivatives Association ('ISDA') master agreement – Bank did not call event of default on client – Bank and client entered into settlement agreement – Settlement agreement recorded terms agreed between parties to restructure obligations of client under ISDA master agreement – Collector of Stamp Duties assessed settlement agreement with ad valorem duty and imposed late payment penalty – Whether ISDA master agreement principal instrument – Whether settlement agreement subsidiary instrument – Whether only principal instrument documenting transaction chargeable with duty – Whether other instruments chargeable with nominal duty of RM10 – Whether settlement agreement fell within any of categories of instruments specified in items 22 or 27 of First Schedule to Stamp Act 1949 – Whether attracted ad valorem duty*

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The appellant's client had defaulted on a payment obligation under a confirmation governed under the International Swaps and Derivatives Association ('ISDA') master agreement. The appellant did not call an event of default on its client. Instead, it agreed to term the payments out over the course of a year. This arrangement was recorded in a settlement agreement and, under its terms, the client would have had to pay the appellant
H 13 instalment payments totalling USD66,306,316.80, which amount comprised the sums that would have been payable under five confirmations had an event of default been specified by the appellant, as well as amendment costs imposed by it. The Collector of Stamp Duties ('respondent') assessed the settlement agreement with *ad valorem* duty, amounting to more than
I RM1.3 million, and imposed a late payment penalty, amounting to RM66,878.25, making the total stamp duty and penalty payable

RM1,404,443.25. The appellant paid the duty and penalty imposed and raised a notice of objection, pursuant to s. 38A of the Stamp Act 1949 ('Act'). The respondent rejected the notice of objection. The appellant's appeal to the High Court, in connection with the imposition of *ad valorem* duty on the settlement agreement, was unsuccessful. Hence, the present appeal. In support of its appeal, the appellant submitted that: (i) the ISDA master agreement, which had been duly stamped, was the principal instrument to which the settlement agreement was a subsidiary instrument. Under s. 4(3) of the Act, only the principal instrument documenting a transaction would be chargeable with the duty prescribed under the First Schedule to the Act. Other instruments would be chargeable with nominal duty of RM10; (ii) the settlement agreement did not fall within any of the categories of instruments specified in items 22 or 27 of the First Schedule to the Act and, hence, ought not to have attracted *ad valorem* duty; (iii) the legal position relating to stamp duty on financial derivatives documented under the ISDA master agreements and confirmations issued thereunder was documented in a letter from the Association of Banks ('ABM') in Malaysia to the Ministry of Finance and the Inland Revenue Board, which stated that the stamp duty payable would be RM10, under item 4 of the First Schedule; and (iv) even if the settlement agreement fell under item 27 of the First Schedule, it ought to have been assessed with stamp duty of RM2,000, on account of the fact that the repayment was to be made in foreign currency.

Held (dismissing appeal with costs)
Per Azizul Azmi Adnan JCA delivering the judgment of the court:

(1) Section 4(3) of the Act provides that where there are more than one instrument documenting a transaction, only the principal instrument would be chargeable with duty in accordance with the First Schedule. All other instruments would be chargeable with nominal duty of RM10 only. The fact that the settlement agreement related to the pre-existing payment obligations entered into under transactions that were governed under the ISDA master agreement was not in material dispute. However, s. 4(3) of the Act was inapplicable because: (i) the settlement agreement did not come within any of 'sale, lease, charge, settlement, exchange of partition' specified in s. 4(3); and (ii) even if it did, on its proper construction, the settlement agreement created new payment obligations of the client to make payments, in accordance with cl. 2.2 of the settlement agreement, and the repayment schedule set out in the appendix to the settlement agreement, in order to settle the outstanding sums under the ISDA master agreement. These payment obligations under cl. 2.2, read together with the appendix, could only be construed to be the 'transaction' referred to in s. 4(3) of the Act. Accordingly, the settlement agreement was the only instrument providing for such payment obligations and would, therefore, be dutiable under the First Schedule. (paras 12, 14 & 15)

(2) By the terms of item 22(1)(a), if an instrument comes within the description provided there, the instrument would be charged with the same *ad valorem* duty as that chargeable on a charge or mortgage under item 27. The expression 'bond' is defined in s. 2 of the Act. The expression 'instrument' is further defined to include every written document. The settlement agreement had been witnessed by Lim Mooi Lan and Pang Sim Huey. It was not a bearer instrument. Under its terms, the client became obliged to pay money to the appellant, within the timelines specified. Thus, the requirements of para. (b) in the definition of 'bond' had been fulfilled. Even though the word 'or' is not used to separate paras. (b) from (a), the paragraphs were to be read disjunctively, based on a proper construction of the words employed. If this were not the case, the words 'any instrument' would not be repeated at the beginning of each paragraph. The settlement agreement was the primary security for sums of money at stated periods. The times specified for the payments were also definite and certain under the appendix to the settlement agreement and the total sum payable was also ascertainable. Therefore, item 22(1)(a) applied in the present case. Further, the use of the expression 'instrument of any kind whatsoever' was sufficiently wide to cover the settlement agreement. The *ejusdem generis* rule of construction was supplanted by the plain words of the provision, which employed the formula 'of any kind whatsoever'. Effect must be given to these words and could not be construed to be mere surplusage. Had these words not been used, any argument may be mounted that the other instruments must be of a kind similar to those previously mentioned. However, the words 'of any kind whatsoever' in this particular provision brooked no doubt and left no room for the application of the *ejusdem generis* rule of construction. (paras 32-39 & 41)

(3) The proper categorisation of a document for stamp duty purposes was a question of law and ultimately one for the courts to determine. The recording of any understanding between a taxpayer and a taxing authority could not have the effect of supplanting the operation of written law, except where the law so permits. Thus, even if the terms of item 1 in Appendix A of the ABM letter were sufficiently wide to cover the settlement agreement, the liability for stamp duty under law remained unaffected. Further, estoppel did not lie against the respondent to prevent him from performing his statutory duty to assess and impose stamp duty on dutiable instruments. (para 50)

(4) Paragraph (a) of item 27 clearly applied in this case as the settlement agreement was the only security for the repayment of money. However, neither sub-paras. (i) or (ii) applied, as the amounts were not payable under a loan. They were originally payable in accordance with

derivatives transactions entered into between the appellant and the client which, according to the recitals to the settlement agreement, included fuel hedging contracts, *ie*, forward contracts to protect against the increase in the price of fuel. Accordingly, the applicable category would be sub-para. (iii), which imposed *ad valorem* duty at 0.5% for all other cases. (para 57)

Case(s) referred to:

Collector Of Imposts (Victoria) v. Cuming Campbell Investments Pty Ltd (1940) 63 CLR 619 ***(refd)***

Jones v. Commissioners Of Inland Revenue [1895] 1 QB 484 ***(refd)***

Lim Mah Chye v. Commissioners Of Stamps (1908) 11 SSLR 90 ***(refd)***

Teruntum Theatre Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2006] 3 CLJ 123 CA ***(refd)***

Legislation referred to:

Stamp Act 1949, ss. 2, 4(3), 38A, 39(1), First Schedule items 4, 22(1)(a), 27(a)(i), (ii), (iii)

For the appellant - Rabindra S Nathan, Foong Pui Chi & Lim Jun Rui; M/s Shearn Delamore & Co

For the respondent - Normareza Mat Rejab; SRC & Norsyazana Safiah Rozman; RC

[Editor's note: For the High Court judgment, please see CIMB Bank Bhd v. Pemungut Duti Setem [2023] CLJU 849; [2023] 1 LNS 849 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Azizul Azmi Adnan JCA:

Introduction

[1] CIMB Bank Berhad, the appellant, appealed to the High Court pursuant to s. 39 of the Stamp Act 1949 in connection with the determination by the stamp office to impose *ad valorem* duty on a settlement agreement that had been entered into between the appellant and its client, a publicly listed company. This settlement agreement recorded the terms by which the parties had agreed to restructure the obligations of the appellant's client under an ISDA master agreement entered between the parties.

[2] ISDA stands for the International Swaps and Derivatives Association. It is an association of banks and other capital market intermediaries that participate in over-the-counter derivatives transactions. The ISDA master agreement and the confirmations issued thereunder are a standardised form of documentation used to govern derivatives such as forward contracts, option contracts and swaps (such as interest rate and cross-currency swaps).

[3] The ISDA master agreement provides an overarching framework to regulate the rights and obligations of parties, and incorporates by reference standardised terms such as definitions, credit support documents and protocols. Individual derivatives transactions are recorded in confirmations.

[4] CIMB's client defaulted on a payment obligation under a confirmation governed under the ISDA master agreement. In the ordinary case, if a counterparty defaults under a transaction governed under the ISDA master agreement, all outstanding transactions under the ISDA master agreement would be terminated and valued. The payment obligations under all such transactions would be set off against each other to leave a net payment amount payable by one of the two parties. This set-off, referred to as close-out netting, avoids the risk of a liquidator of an insolvent counterparty from subsequently cherry-picking and avoiding transactions that are considered to be unfavourable to the counterparty.

[5] In the present case, however, CIMB did not call an event of default on its client. Instead, it agreed to term the payments out over the course of a year. This arrangement was recorded in a settlement agreement dated 18 December 2020. Under its terms, the client would have had to pay CIMB 13 instalment payments totalling USD66,306,316.80. This amount comprised the sums that would have been payable under five confirmations had an event of default been specified by CIMB, as well as amendment costs imposed by it.

[6] The Collector of Stamp Duties assessed the settlement agreement with *ad valorem* duty, amounting to more than RM1.3 million. It also imposed a late payment penalty amounting to RM66,878.25, making the total stamp duty and penalty payable RM1,404,443.25.

[7] CIMB paid the duty and penalty imposed, and raised a notice of objection in accordance with s. 38A of the Stamp Act 1949. On 18 May 2023, the Collector rejected the notice of objection.

[8] CIMB then appealed to the High Court pursuant to the provisions of s. 39(1) of the Stamp Act 1949. The High Court dismissed the appellant's appeal.

[9] Four arguments were advanced on behalf of CIMB in the appeal before us:

(i) it was argued that the ISDA master agreement dated 9 January 2007, which had been duly stamped, was the principal instrument to which the settlement agreement was a subsidiary instrument. Under s. 4(3) of the Stamp Act 1949, only the principal instrument documenting a transaction would be chargeable with the duty prescribed under the First Schedule to the Stamp Act 1949; other instruments would be chargeable with nominal duty of RM10;

(ii) it was advanced for CIMB that the settlement agreement did not fall within any of the categories of instruments specified in items 22 or 27 of the First Schedule to the Stamp Act 1949, and hence ought not to have attracted *ad valorem* duty;

(iii) it was argued that the legal position relating to stamp duty on financial derivatives documented under ISDA master agreements and confirmations issued thereunder is documented in a letter from the Association of Banks in Malaysia dated 9 December 2009 to the Ministry of Finance and the Inland Revenue Board, which stated that the stamp duty payable would be RM10 under item 4 of the First Schedule; and

(iv) finally, the argument was advanced that, even if the settlement agreement fell under item 27 of the First Schedule, it ought to have been assessed with stamp duty of RM2,000, on account of the fact that the repayment was to be made in foreign currency.

[10] Each of these points are addressed in turn below.

Subsidiary Agreement

[11] Learned counsel for CIMB argued that the settlement agreement was entered into between CIMB and its client due to the failure of the latter to meet its payment obligations under the transactions documented under the confirmations issued under the ISDA master agreement. Thus, the payment obligations under the settlement agreement were pre-existing obligations under the ISDA master agreement. Had there been no amounts due under the ISDA master agreement, there would not have been any need to enter into the settlement agreement.

[12] These points are well made. However, having carefully examined the relevant facts in this case, in particular having regard to the proper construction of the settlement agreement, we are of the view that s. 4(3) of the Stamp Act 1949 is inapplicable in the circumstances of the present case.

[13] Section 4 of the Stamp Act 1949 is the principal operative provision imposing duty on instruments. It provides as follows:

> Instruments chargeable with duty
>
> 4(1) Subject to this Act and subject to the exemptions contained in this Act and in any written law for the time being in force, the several instruments specified in the First Schedule shall, from and after the commencement of this Act, be chargeable with the several duties specified in such Schedule.
>
> (2) Nothing in this Act shall render liable to additional duty any instrument whereon duty is expressly imposed under any other written law in force in Malaysia.

A (3) Where in the case of any sale, lease, charge, settlement, exchange or partition several instruments are employed for completing the transaction, the principal instrument only shall be chargeable with the duty prescribed in the First Schedule for the conveyance, lease, charge, settlement or partition and each of the other instruments shall be chargeable with a duty of ten ringgit only; and the parties may determine for themselves which
B of the instruments so employed shall, for the purpose of this subsection, be deemed to be the principal instrument.

(4) The duties imposed by such Schedule may be cancelled, varied or added to by a resolution of the House of Representatives.

C **[14]** Of particular relevance is s. 4(3), which provides that where there is more than one instrument documenting a transaction, only the principal instrument would be chargeable with duty in accordance with the First Schedule. All other instruments would be chargeable with nominal duty of RM10 only.

D **[15]** The fact that the settlement agreement relates to the pre-existing payment obligations entered into under transactions that were governed under the ISDA master agreement was not in material dispute. However, in our view, s. 4(3) of the Stamp Act 1949 is inapplicable because:

(i) the settlement agreement does not come within any of "sale, lease,
E charge, settlement, exchange or partition" specified in s. 4(3); and

(ii) in any event, even if it did, on its proper construction, the settlement agreement created new payment obligations of the client to make payments in accordance with cl. 2.2 of the settlement agreement and the repayment schedule set out in the appendix to the settlement agreement,
F in order to settle the outstanding sums under the ISDA master agreement. These payment obligations under cl. 2.2 read together with the appendix can only be construed to be the "transaction" referred to in s. 4(3) of the Stamp Act 1949. Accordingly, the settlement agreement was the only instrument providing for such payment obligations, and
G would therefore be dutiable under the First Schedule.

These two conclusions are explained in detail in the following paragraphs.

Not A Settlement

[16] The word "settlement" is defined in s. 2 of the Stamp Act 1949 in the
H following manner:

"settlement" means any non-testamentary disposition in writing whether made voluntarily or upon a good or valuable consideration other than a *bona fide* pecuniary consideration whereby any definite and certain property is settled or agreed to be settled in any manner for any purpose
I whatsoever;

[17] It may thus be seen that the expression is used not to mean an act to satisfy a demand (which is the sense used in the settlement agreement), but rather is used to mean a disposition otherwise than a bequeathment under a will.

[18] The word "property" is, in turn, defined in the following manner:

> "property" includes movable or immovable property and any estate or interest in any property movable or immovable, whether in possession, reversion, remainder or contingency, and any debt, and anything in action, and any other right or interest in the nature of property which is capable of being disposed of and has a value in it;

[19] From this definition, it may be seen that a disposition of a debt or chose in action would come within the definition of "settlement". A debt, being the right to receive money, is of course a specie of a chose in action. In modern terminology (bearing in mind that the Stamp Act 1949 has its genesis in a piece of 19th century English legislation), a disposition of a debt may be described as an assignment of a book debt, or an assignment of accounts receivable. By this construction, a promise to pay a debt cannot be said to be an assignment of receivables and hence would not constitute a "settlement" within the meaning of the Stamp Act 1949. At its core, the settlement agreement was a promise to pay a debt. There was no disposition contemplated.

[20] Of crucial importance are the words "other than a *bona fide* pecuniary consideration" appearing in the definition of "settlement". The effect of these words is that, where full and valuable consideration is paid for the disposition of assets, the instrument documenting such transaction would not be dutiable as a settlement (but may well be dutiable under another item of the Stamp Act 1949, such as a conveyance). Thus, properly understood, settlements would include gratuitous gifts as well as gifts supported by valuable but not full consideration. However, a transaction negotiated on an arm's length basis and supported by full value would not constitute a settlement for the purposes of the Stamp Act 1949.

[21] In our considered view, the expression "settlement" under the Stamp Act 1949 encompasses transactions such as a transfer of property to a trustee to constitute a trust, or an *inter vivos* transfer of property, either without consideration or where less than full value has been provided. We find support for our conclusion from the case of *Collector Of Imposts (Victoria) v. Cuming Campbell Investments Pty Ltd* (1940) 63 CLR 619, a decision of the High Court of Australia on provisions that share a common heritage with the Stamp Act 1949.

[22] The settlement agreement is thus not a "settlement" within the meaning of the Stamp Act 1949. Nor can the ordinary meaning of any of the words "sale", "lease", "charge", "exchange" or "partition" be applied to the settlement agreement. For this reason, we conclude that s. 4(3) of the Stamp Act 1949 is inapplicable.

Not A Subsidiary Instrument

[23] Furthermore, even if the settlement agreement came within the expression "settlement" as used in Stamp Act 1949, the settlement agreement is not an instrument of which the ISDA master agreement can be said to be the principal instrument. This is explained in the following paragraphs.

[24] Shorn of the words that are extraneous for the present purposes, s. 4(3) reads as follows:

> Where in the case of any … settlement, … several instruments are employed for completing the transaction, the principal instrument only shall be chargeable with the duty prescribed in the First Schedule … and each of the other instruments shall be chargeable with a duty of ten ringgit only.

[25] The "transaction" referred to here must relate to the obligation to make payments in accordance with the appendix to the settlement agreement. This must necessarily be the case, because the deferred payment obligations would not be found in the ISDA master agreement or in any of the confirmations issued under it. There is thus only one instrument documenting the "transaction", and hence s. 4(3) would not apply. The precondition in s. 4(3) is that there must be more than one instrument employed in completing the transaction.

[26] We must, therefore, look to the terms of the First Schedule to ascertain the duty payable in respect of the settlement agreement.

[27] The High Court relied on the entire agreement clause in cl. 6 of the settlement agreement in arriving at the conclusion of that the settlement agreement amounted to a standalone agreement that was separate from the ISDA master agreement. We are of the view that the entire agreement clause on its own is not decisive or determinative in the present case in as far as the incidence of stamp duty is concerned. The purpose of such a clause is, of course, to exclude collateral contracts or representations from taking effect in the bargain that has been struck between the parties. In the present case, the context of the case clearly established that the settlement agreement related to the prior payment obligations under transactions entered into between the parties that were governed under the ISDA master agreement.

[28] What is key in this case is that the settlement agreement created obligations on the part of the client to make repayments in accordance with the repayment schedule. While it is undeniable that the settlement agreement

related to the prior obligations under the ISDA master agreement, that it in itself was not sufficient to trigger the operation of s. 4(3) of the Stamp Act 1949.

Items 22 And 27 Of The First Schedule

[29] Learned counsel for CIMB argued that the settlement agreement did not come within either item 22 or item 27 of the First Schedule to the Stamp Act 1949.

[30] In our view, item 22 applied for the following reasons:

(i) first, the settlement agreement comes within para. (b) of the definition of "bond" in s. 2 of the Stamp Act 1949; and

(ii) second and in any event, the words "instrument of any kind whatsoever" are sufficiently broad to cover the settlement agreement.

These two points are addressed in turn in the following paragraphs.

Bond

[31] Item 22(1)(a) of the First Schedule reads as follows:

> 22 BOND, COVENANT, LOAN, SERVICES, EQUIPMENT LEASE AGREEMENT OR INSTRUMENT of any kind whatsoever:
>
> (1) Being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity), or for any sum or sums of money at stated periods, not being interest for any sum secured by a duly stamped instrument, nor rent reserved by a lease or tack –
>
> | | |
> |---|---|
> | (a) for a definite and certain period so that the total amount to be ultimately payable can be ascertained. | *The same ad valorem duty as a charge or mortgage for such total amount.* |
>
> (emphasis added)

[32] Thus, by the terms of item 22(1)(a), if an instrument comes within the description provided there, the instrument would be charged with the same *ad valorem* duty as that chargeable on a charge or mortgage under item 27.

[33] The expression "bond" is defined in s. 2 of the Stamp Act 1949 in the following manner:

> "bond" means –
>
> (a) any instrument whereby a person obliges himself to pay money to another on condition that the obligation shall be void if a specified act is performed or is not performed, as the case may be;
>
> (b) any instrument, attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another;

[34] The expression "instrument" is further defined to include every written document. In our case, the settlement agreement has been witnessed by Lim Mooi Lan and Pang Sim Huey. It is not a bearer instrument. Under its terms, the client became obliged to pay money to CIMB, within the timelines specified. Thus, the requirements of para. (b) in the definition of "bond" have been fulfilled.

[35] Even though the word "or" is not used to separate para. (b) from para. (a), we are of the view that the paragraphs are to be read disjunctively, based on a proper construction of the words employed. If this were not the case, the words "any instrument" would not be repeated at the beginning of each paragraph.

[36] We observe that there is no requirement for a bond to be executed as a deed: *Lim Mah Chye v. Commissioners Of Stamps* (1908) 11 SSLR 90.

[37] The settlement agreement was the primary security for sums of money at stated periods. The times for specified for payment is also definite and certain under the appendix to the settlement agreement, and total sum payable also ascertainable. The expression "security" in the context of the Stamp Act 1949 has a meaning peculiar to the Act, and has been held to mean any obligation created by an instrument: *Jones v. Commissioners Of Inland Revenue* [1895] 1 QB 484.

[38] Accordingly, we are impelled to conclude that item 22(1)(a) applies in the present case.

Instrument Of Any Kind Whatsoever

[39] Separately and independently of the reasoning employed in the preceding paragraphs, we are also of the view that the use of the expression "instrument of any kind whatsoever" is sufficiently wide to cover the settlement agreement.

[40] Learned counsel for the appellant argued that the written document referred to in item 22 must be an instrument that is similar to a bond, covenant loan and service.

[41] In our judgment, the *ejusdem generis* rule of construction is supplanted by the plain words of the provision, which employs the formula "of any kind whatsoever". Effect must be given to these words and cannot be construed to be mere surplusage. Had these words not been used, an argument may be mounted that the other instruments must be of a kind similar to those previously mentioned. However, the words "of any kind whatsoever" in this particular provision brooks no doubt and leaves no room for the application of the *ejusdem generis* rule of construction.

The ABM Letter

[42] Learned counsel for CIMB referred to a letter dated 9 December 2009 issued by the Association of Banks in Malaysia (the "ABM letter"), and argued that the Collector of Stamp Duties was bound by the terms of this letter to assess only nominal duty on the settlement agreement.

[43] The letter was addressed to the Ministry of Finance and to the Stamp Duty Department of the Inland Revenue Board and recapitulated the discussion at a meeting held on 15 November 2009. The purpose of the meeting, as could be gleaned from the letter itself, was to discuss the effect of the 2009 amendments to the Stamp Act 1949.

[44] The material portion of the letter stated as follows:

> We also note your observation at the said meeting that the position prior to the 2009 amendments to the Stamp Act shall continue to apply in respect of the documents/categories of documents reproduced for ease of reference in the attachment to this letter marked as Appendix A. In this regard, stamp duty shall continue to be payable with regard to the same under item 4 of the First Schedule to the Stamp Act.

[45] Appendix A to the letter contained the following table:

No.	Jenis-jenis dokumen	Usul bagi Duti Setem Berbayar
1	Dokumen-dokumen International Swaps and Derivatives Association (ISDA) dan dokumen-dokumen lain yang hampir sama atau berkaitan dengan transaksi derivatif termasuk dokumen sokongan kredit ("credit support documents") sepertimana dirujuk di bawah ISDA dan dokumen tambahan sokongan kredit ("credit support annex")	Setem duti RM10 di bawah item nombor 4, Jadual Pertama Akta Setem.
2	Surat tawaran dan dokumen berkaitan (termasuk terma dan syarat) untuk transaksi derivatif dan transaksi tukaran asing, yang tidak melibatkan pinjaman ("unadvised derivative or foreign exchange facilities")	Setem duti RM10 di bawah item nombor 4, Jadual Pertama Akta Setem
3	Surat jaminan berkaitan pembayaran transaksi derivatif dan tukaran asing di bawah ISDA atau dokumen-dokumen lain hampir sama atau yang melibatkan terma dan syarat untuk transaksi derivatif dan tukaran asing.	Setem duti RM10 di bawah item nombor 4, Jadual Pertama Akta Setem

4	Pengesahan dan lain-lain dokumen untuk pelaburan atau deposit berstruktur, instrumen-instrumen pasaran wang dan lain-lain dokumen, deposit termasuk Instrumen Deposit Boleh Niaga.	Terkecuali dari setem duti di bawah item 4(e), Jadual Pertama Akta Setem.
5	Dokumen-dokumen pembukaan akaun, dokumen-dokumen pembukaan akaun urusniaga saham, perjanjian kredit kad, perjanjian perkhidmatan perbankan, (sebagai contoh: perbankan telefon/internet/custodi), perjanjian urusniaga saham, perjanjian perlantikan custodi, surat-surat arahan tetap, surat-surat pengambilan perkerjaan, surat perlantikan penasihat/ mandat dan lain-lain perjanjian berkaitan dengan perbankan yang melibatkan jumlah wang.	Setem duti RM10 di bawah item nombor 4, Jadual Pertama Akta Setem.

[46] Of particular relevance is item 1 in the table above, where the ABM letter proposed that ISDA documentation and other similar documents and other documents relating to derivative transactions would be chargeable with nominal duty of RM10 under item 4 of the First Schedule. Before us, counsel for CIMB argued that the settlement agreement was a document that related to derivative transactions and so should be chargeable only with nominal duty.

[47] The ABM letter was exhibited in the affidavit in support affirmed by Mr Chu Kok Wei, CIMB's Head of Treasury and Markets. In the affidavit, Mr Chu stated:

> 21. I verily believe that the industry practice adopted by the banks for trading in derivatives in Malaysia is in accordance with the understanding captured in ABIM's letter dated 9.12.2009. The Respondent is aware of the industry practice.

[48] Affidavit in reply filed on behalf of the Collector responded to this averment by stating that, while the documents listed in Appendix A to the ABM letter was chargeable with nominal duty, the settlement agreement did not fall within the scope of the items listed in the appendix.

[49] Learned counsel for CIMB submitted to this court and to the court below that the applicability of the terms of the ABM letter had not been denied and was thus not put into issue. Thus – according to counsel – the Collector was bound by the letter, and was estopped from denying that the applicable duty was that which was set out in the ABM letter.

[50] We found ourselves unable to agree for two reasons:

(i) first, the proper categorisation of a document for stamp duty purposes was a question of law and ultimately one for the courts to determine. The recording of any understanding between a taxpayer and a taxing authority cannot have the effect of supplanting the operation of written law, except where the law so permits. Thus, even if the terms of item 1 in Appendix A of the ABM letter are sufficiently wide to cover the settlement agreement, the liability for stamp duty under the law remains unaffected;

(ii) second and no less significantly, estoppel does not lie against the Collector of Stamp Duties to prevent him from performing his statutory duty to assess and impose stamp duty on dutiable instruments.

[51] The latter principle is well-established. In the Court of Appeal case of *Teruntum Theatre Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2006] 3 CLJ 123, it was held as follows:

> [18] Estoppel is a rule of evidence which can only be invoked in special circumstances. The estoppel relied upon by the taxpayer against revenue in this case is that of estoppel *in pais*, *ie*, estoppel by words or conduct. In our view the Special Commissioners were not wrong to reject the suggestion that the assessment by the respondent of a taxpayer under the RPGT was an irrevocable act. Estoppel cannot be invoked against the Director General of Income Tax when he is put to notice that an incorrect assessment has been made under the RPGT. The Director General cannot raise an estoppel against himself from discharging his statutory duty to raise a correct assessment under the appropriate law if the basis of treating the gain as a capital gain was not within the meaning ascribed to it by the RPGT and no real property gains tax is payable. In such a situation the Director General is not absolved from discharging his duty of raising the correct assessment in accordance with the relevant law. No person can raise an estoppel against himself so as to defeat a positive duty imposed upon him by a statute (*Maritime Electric Co. Ltd v. General Diaries Ltd.* [1937] AC 610 at pp. 620-621). The duty of both parties, the Director General and the taxpayer, is to obey the law.

[52] That case was on real property gains tax and had been commenced against the Director General of Income Tax. The same principles, in our view, apply in respect of a plea of estopped against the Collector of Stamp Duties.

Item 27(a)(ii) Of The First Schedule

[53] As explained at para. [32] *ante*, if an instrument comes within the description of item 22(1)(a), it would be chargeable with *ad valorem* duty as though it were a charge or mortgage under item 27.

[54] Learned counsel for CIMB submitted that, because the payment obligations of the client were denominated in US dollars, the settlement agreement would come within item 27(a)(ii), and the duty payable would only be RM2,000.

[55] In our considered view, the applicable item was item 27(a)(iii), which imposed *ad valorem* duty of RM5 on every RM1,000 or part thereof (or 0.5%).

[56] Item 27(a) reads as follows:

27 CHARGE OR MORTGAGE, AGREEMENT FOR A CHARGE OR MORTGAGE (including that under the Syariah), BOND, COVENANT, DEBENTURE (not being a marketable security) BILL OF SALE by way of security and WARRANT OF ATTORNEY to confess and enter up judgment:

(a) Being the only or principal or primary security (other than an equitable mortgage or an assignment of receivables or the kind mentioned in paragraph (d)) for the payment or repayment of money -

(i) where the loan is to a small and medium enterprise or financing is provided to a small and medium enterprise according to the syariah -

For an amount not exceeding RM250,000 of the aggregate loans or of the aggregate financing under the syariah in a calendar year	*RM0.50 for every RM1,000 or fractional thereof*
For each additional RM1,000 not exceeding RM1,000,000	*RM2.50 for every RM1,000 or fractional thereof*
For each additional RM1,000 or part thereof	*RM5.00*

(ii) where the loans is a foreign currency loan or the financing was made according to the syariah in currencies other than the ringgit — *RM5.00 for every RM1,000 or part thereof*

(iii) in any other case -

For each RM1,000 or part thereof	*RM5.00*

(emphasis added)

[57] Paragraph (a) of item 27 clearly applied in this case, as the settlement agreement was the only security for the repayment of money. However, neither sub-paras. (i) or (ii) applied, as the amounts were not payable under a loan. They were originally payable in accordance with derivatives transactions entered into between CIMB and the client, which according to the recitals to the settlement agreement included fuel hedging contracts (*ie*, forward contracts to protect against the increase in the price of fuel). Accordingly, the applicable category would be sub-para. (iii), which imposed *ad valorem* duty at 0.5% for all other cases.

[58] For the reasons explained, the appeal is dismissed with costs of RM20,000, such costs to be subject to an allocatur.